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Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

STEVEN R. NORDGREN,

Plaintiff-Appellant,

vs.

JOHN W. TURNER, Warden,
Utah State Prison,

Defendant-Respondent.

Case No.
12815

BRIEF OF RESPONDENT

APPEAL FROM THE ORDER OF THE
JUDICIAL DISTRICT COURT, THE HONORABLE
JOSEPH G. JEPSON, PRESIDING, GRANTING
RESPONDENT'S MOTION TO DENY
APPELLANT'S WRIT OF HABEAS CORPUS

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Clerk, Supreme Court

TABLE OF CONTENTS

	Page
STATEMENT OF THE NATURE OF THE CASE	1
DISPOSITION IN THE LOWER COURT	1
RELIEF SOUGHT ON APPEAL	2
STATEMENT OF THE FACTS	2
ARGUMENT:	
POINT I	
THE ORDER GRANTING RESPONDENT'S MOTION TO DISMISS SHOULD BE AFFIRM- ED SINCE PETITIONER DID NOT RAISE PROPER ISSUES FOR REVIEW IN A HABEAS CORPUS PROCEEDING	3
CONCLUSION	5

CASES CITED

Brown v. Turner, 21 Utah 2d 96, 440 P. 2d 968 (1968)	4
Bryant v. Turner, 19 Utah 2d 284, 431 P.2d 121 (1967)	4

IN THE SUPREME COURT OF THE STATE OF UTAH

STEVEN R. NORDGREN,

Plaintiff-Appellant,

vs.

JOHN W. TURNER, Warden,
Utah State Prison,

Defendant-Respondent.

Case No.
12815

BRIEF OF RESPONDENT

STATEMENT OF THE NATURE OF THE CASE

Appellant, Steven R. Nordgren, appeals from a decision of the Third Judicial District Court, the Honorable Joseph G. Jeppson, presiding, granting respondent's motion to dismiss appellant's writ of habeas corpus.

DISPOSITION IN THE LOWER COURT

The Honorable Joseph G. Jeppson granted respondent's motion to dismiss having heard arguments and representations of counsel at a hearing on the motion to dismiss on the 6th day of January, 1972.

RELIEF SOUGHT ON APPEAL

Respondent seeks affirmance of the order granting respondent's motion rendered below.

STATEMENT OF FACTS

Appellant, being fully represented by counsel, was found guilty in the Third Judicial District Court of the crime of burglary in the second degree and grand larceny by a jury in Case No. 19924 and was committed to the Utah State Prison to serve both sentences concurrently on December 12, 1966. Appellant did not appeal his conviction.

On November 26, 1971, appellant filed a petition for a writ of habeas corpus wherein appellant stated the following as his grounds for seeking a writ of habeas corpus:

"A. The prosecutor's remarks, insinuations and line of questioning appellant's father and also summary to the jury were calculated to mislead and prejudice the jury.

B. The court failed to instruct the jury as to a lesser included offense."

On December 20, 1971, respondent filed a motion to dismiss appellant's petition for writ of habeas corpus. Hearing upon that motion was set for January 6, 1972, before Honorable Joseph G. Jeppson. At that hearing the court heard arguments and representations by counsel and granted respondent's motion to dismiss.

ARGUMENT

POINT I

THE ORDER GRANTING RESPONDENT'S MOTION TO DISMISS SHOULD BE AFFIRMED SINCE PETITIONER DID NOT RAISE PROPER ISSUES FOR REVIEW IN A HABEAS CORPUS PROCEEDING.

Appellant's allegations of error were known or should have been known to him at the time the judgment was rendered against him. Appellant thus had an obligation to call the alleged error to the court's attention for a remedy, and that failing, there was a duty to seek review and correction on appeal. The judgment became final since appellant did not seek correction, and is not now subject to further attack since neither of the issues raised in the petition is proper for review under habeas corpus proceedings.

In explaining the scope of habeas corpus proceedings, this court has stated:

"[*Habeas Corpus] is not a substitute for and cannot properly be treated as a regular appellate review. It is an extraordinary remedy which is properly invocable only when the court had no jurisdiction over the person or the offense, or where the requirements of law have been so disregarded that the party is substantially and effectively denied due process of law, or where some such fact is shown that it would be unconscionable not to re-examine the conviction. If the contention of error is something which is known or should be known to the party at the time the judgment was entered, it must be reviewed in the manner and within the time permitted by regular prescribed procedure,

or the judgment becomes final and is not subject to further attack, except in some such unusual circumstance as we have mentioned above." *Brown v. Turner*, 21 Utah 2d 96, 98, 440 P. 2d 968 (1968).

Since appellant failed to show that the trial court lacked jurisdiction, that he was substantially denied a constitutionally protected right, or that it would be unconscionable for the court not to review the conviction, he has failed to state a proper issue for review in a habeas corpus proceeding.

Appellant was represented by competent counsel, and the appellant does not allege that he was not represented by competent counsel. Thus, if there were any error in the instructions or if the prosecutor's remarks were improper, the proper remedy was to have that brought out at that time. The alleged errors raised by appellant were subject for direct appeal, but they are not a proper basis for collateral attack on habeas corpus.

Appellant cites *Bryant v. Turner*, 19 Utah 2d 284, 431 P.2d 121 (1967), however, *Bryant* explains the scope of review of habeas corpus in a manner similar to that in *Brown v. Turner*, *supra*.

Bryant explains that the writ of habeas corpus is an extraordinary writ and is to be used:

" . . . where there exists no jurisdiction or authority or where *the requirements of the law have been so ignored or distorted.*" (Emphasis added.)

Appellant does not allege that the court lacked jurisdiction, or that the requirements of the law have been ignored, but rather merely points to alleged errors that could easily have been raised at trial, and reviewed on direct appeal.

CONCLUSION

Appellant did not raise allegations of error in his petition for writ of habeas corpus which are proper issues for review in a habeas corpus proceeding. Respondent respectfully submits, therefore, that the order granting respondent's motion to dismiss be affirmed.

Respectfully submitted,

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